United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD WALLACE, et al.,	:	
Plaintiffs - Appellees	:	
v.	:	NO. 74-1434
MICHAEL KERN, et al.,	:	
Defendants - Appellants	:	

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AMICUS CURIAE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1434

DONALD WALLACE, et al., PLAINTIFFS - APPELLEES

v.

MICHAEL KERN, et al., DEFENDANTS - APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE

Interest of Amicus

The National Legal Aid and Defender Association (hereafter "NLADA") is a national, private, non-profit corporation devoted to furthering the precept of equal justice under law for all. Its membership consists of the great majority of legal services programs, public defender offices, and coordinated assigned counsel systems throughout the United States. NLADA also has approximately 3,500 individual members,

many of whom are practicing attorneys who represent poor people in criminal and civil matters.

Most recently NLADA completed a two year survey of defender systems in the United States, entitled The Other Face of Justice. The survey was funded by L.E.A.A., and was designed to discover how defense services for the poor have been implemented.

The issue of lengthy pre-trial incarceration presented by this case is a recurring problem for defenders throughout the country, and this Court's decision could have a profound impact upon the members and the purposes of NLADA.

QUESTION PRESENTED

DOES LENGTHY PRE-TRIAL CONFINEMENT PLACE A CONSTITUTIONALLY IMPERMISSABLE BURDEN ON A DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF THE CASE

The statement of the jurisdiction and facts in this case are adequately set forth in the Brief for Appellees.

ARGUMENT

LENGTHY PRE-TRIAL CONFINEMENT PLACE A CONSTITUTIONALLY IMPERMISSABLE BURDEN ON A DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The "right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment," Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). Indeed once violation of the right has been established the remedy is dismissal of the delayed charges, regardless of the defendant's guilt or innocence, Strunk v. United States, 412 U.S. 434, 37 LEd2d 56 (1973).

If justice requires prompt disposition of charges for one who is free to move about, Klopfer v. North Carolina, supra, then it is more imperative that justice also requires, indeed demands, speedy dispositions for those detained in jail prior to their trials, cf Smith v. Hooey, 393 U.S. 374 (1969).

The considerations underlying the need for speedy trial for pre-trial detainees are several. Not only does the Sixth Amendment require such speedy trials, but American jurisprudence extolls the "presumption of innocence until proven guilty," and abhors massive intrusions upon personal liberty without full procedural safeguards. "The public interest in

a broad sense, as well as the constitutional guarantee, command prompt disposition of criminal charges," Strunk v. United States, supra, 37 LEd 2d at 61 n.2. The evidence adduced below clearly reflected a systematic pattern of delay in disposing of criminal charges for up to twelve and thirteen months for pre-trial detainees, and the court concluded that such delays violated the detainees' right to a speedy trial.

The decision below was not grounded solely in the denial of speedy trials, however. Judge Judd also concluded:

> Since an unconvicted defendant in a detention facility actually enjoys fewer amenities than a convicted prisoner in a correctional institution, over-long confinement without being convicted, simply for being poor, is also a denial of due process. (Slip opinion at 15).

Therefore, it is not sufficient to simply conclude, as have prior courts dealing with conditions of confinement for pre-trial detainees, that pre-trial detainees, unconvicted of any crime, cannot be treated as if they were convicted prisoners. Rather, the due process clause demands that detainees not be held in custody at all for extended periods.

The sole purpose of pre-trial confinement is to assure the presence at trial of a defendant who is unable to post a money bond. Thus, while a reasonable time is necessary for the State's administrative mechanisms to function, this

interest must be balanced against the detainees' transcending interest in his or her own liberty. The length of incarceration must bear a rational relationship to the nature and purpose of the incarceration, McNeil v. Director, 407 U.S. 245 (1972). Confinement without conviction for more than seven and one half months is an unjustifiable curtailment of liberty.

The personal hardships endured by the incarcerated are onerous, as the court below noted, slip opinion at 10-11, and traditionally pre-trial detainees have been treated as harshly as if they had been convicted, cf: Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp 676 (D. Mass 1973); Brenneman v. Madigan, 343 F. Supp 128 (N.D. Cal. 1972). Detainees face the loss of jobs, of social benefits, of familial relationships, not because they have been found dangerous, but rather because of their inability to raise bond; See National Advisory Commission on Criminal Justice Standards and Goals, Corrections, 98-110 (1973).

Such personal rigors give rise to a third grave constitutional problem - the detainee's Sixth Amendment right to the effective assistance of defense counsel. "The possibilities that long delay will impair the ability of an accused to defend himself are markedly increased when the accused is

incarcerated..." Smith v. Hooey, supra, 393 U.S. at 378-9. It is this facet of lengthy pre-trial detention to which amicus shall primarily address itself.

Although it is now clear that all persons are entitled to counsel before they may be deprived of liberty, Argersinger v. Hamlin, 407 U.S. 25 (1972), "society must make a substantially greater commitment to the goal of equality in the administration of criminal justice..." NLADA, The Other Face of Justice: A Report of the National Defender Survey, 77 (1974). The problems of effective assistance of counsel are already myriad in many jurisdictions,[1/] and are further exacerbated when the clients of these lawyers are detained.

The ABA Project on Standards Relating to the Prosecution Function and the Defense Function, (Approved Draft 1971) (hereafter ABA Standards) describe the defense attorney as the "champion for his client," Id at 141.[2/] The lawyer acts as an agent, to compensate for the client's inarticulateness or his or her lack of knowledge about legal procedures. In order to accomplish this, the lawyer needs full disclosure and freedom to act without interference. Id at 141-152.

1/ For example, the NLADA Report, supra, indicates that many jurisdictions overburden defenders with high case loads, inexperienced and/or inadequate staff and supportive services. These same defenders then often face a hostile local judiciary or an uncooperative local bar, Id at 77-80.

2/ "While the Standards claim that they are not intended 'as criteria for judicial evaluation of effectiveness,' they are certainly relevant guideposts in this largely uncharted area," U.S. v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973).

Yet the fact of pre-trial incarceration undermines the existence of a meaningful relationship between attorney and client. While the indigent accused who is free on a release program may simply resent a defender's heavy caseload, to the incarcerated indigent the size of the caseload, the long detention, and the long silences between visits are intolerable.[3/] The detainee begins to view the public defender or the appointed counsel as a part of the criminal justice system and not as an advocate "championing for his client."

ABA Standard 3.6 requires "prompt action" by counsel to protect the accused. Yet in many jurisdictions counsel is not present at bail hearings and is not assigned until a later stage of the proceedings. Thus, the detained person's access to counsel is substantially more limited than a released person's access, particularly in the initial stages when legal advice is most critical. Since counsel "should also be concerned with the accused's right to be released from custody pending trial," U.S. v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973), the defendant's sixth amendment rights may be severely damaged from the outset.

3/ The demands on defender systems are likely to continue to increase. The NLADA Defender Survey, supra, at 77, estimates that an additional 14,400 defenders would be needed to implement the requirements of Argersinger and the National Advisory Commission Standards.

Perhaps the most essential duty of a defense attorney is to "explore disposition without trial," ABA Standard 6.1. Such negotiations can occur prior to indictment or after; they can relate to the number or severity of the charges, or to a sentence, ABA Standards at 148. However, the defense lawyer's ability to engage in such negotiation is critically hampered by the defendant's incarceration. The defendant is more likely to feel pressure from factors unrelated to the alleged offense. Separation from family, loss of job, overcrowded and filthy living conditions - all are likely to enhance the accused's desire to enter a guilty plea and to "get it over with." These factors increase in importance with the passage of time, and not only do they effect the voluntariness of potential guilty pleas, they place the heaviest burden on the accused who exercises his or her right to a trial, for it is that person who must remain incarcerated pending actual trial.

ABA Standard 4.1 imposes the duty of investigation upon defense counsel. In the great majority of criminal cases the central investigatory device is the defendant. He or she knows the neighborhood, knows eyewitnesses or alibi witnesses and has access to people and places not generally

available to the lawyers. The incarcerated accused cannot fully participate in this investigation, and the defense attorney's sole opportunity to foster full disclosure and to examine all facts must occur in the coercive setting of the local jail. See, ABA Standards, Commentary at 204-5; U.S. v. DeCoster, supra, 487 F.2d at 1204; Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert den. 393 U.S. 849 (1968).

Counsel is also required to keep his or her client fully advised of all developments in the case, ABA Standard 3.8. Where a client is free, telephone communications can be unlimited, mail correspondence unfettered, personal visitations unrestricted. The detainee, however, is not readily accessible, further hampering the lawyer's ability to quickly make important decisions without further delaying the case.

Certain of defense counsel's legitimate motions[4/] may be waived out of a desire to move the case along, rather than

4/ While it is often true that defense attorneys may make dilatory motions to delay proceedings, it remains "the duty of the charging authority...to provide a prompt trial," Dickey v. Florida, 398 U.S. 30, 37-8 (1970). There are professional sanctions available for attorneys who abuse the motion practice, and the fact that the defendant occasioned the delay would be a factor to consider in deciding if constitutional rights were in fact violated, cf. Barker v. Wingo, 407 U.S. 514 (1972), U.S. v. Counts, 471 F.2d 422 (2d Cir. 1973).

out of a professional judgement that they are lacking in merit. For example, a meritorious motion for a change of venue, which could result in a detainee's being incarcerated in a more remote jail, further removed from family and friends, might be sacrificed for factors purely extraneous to legal worth of the motion which do not face the accused who is released prior to trial.

These factors are in addition to the lapse of memories, deaths and disappearances of witnesses, and destruction of tangible evidence which occur naturally over a period of time, against which the Sixth Amendment was specifically designed to protect regardless of the defendant's locus.

The net effect of these circumstances is that the fact of pre-trial incarceration results in both a significantly higher proportion of convictions and significantly harsher sentences following those convictions. See, e.g., Bellamy v. The Judges, 13 CR.L. 1340 (New York Supreme Court, 1973, Plaintiffs' Memorandum of Law).

The detained defendant thus suffers not only the loss of freedom without conviction and the loss of a prompt disposition; but the detainee is also denied effective assistance to counsel when he or she attempts to defend against

the criminal charges.

> If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government [can establish lack of prejudice]. U.S. v. DeCoster, supra, 487 F.2d at 1204.

Clearly this is more than is contemplated by a bailbond system designed to assure the accused's appearance at trial.

CONCLUSION

For the foregoing reasons, amicus urges this Court to affirm the decision of the District Court in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I herby certify that a copy of the foregoing motion for Leave to File and Brief of Amicus Curiae was sent, postage prepaid by first class mail, to Stephen E. Latimer, Esq., 579 Courtland Avenue, Bronx, New York 10451, Alvin J. Bronstein, Esq., 1424 16th Street, N.W., Washington, D.C., and Hillel Hoffman, Esq., Assistant Attorney General, Department of Law 2 World Trade Center, New York, New York 10047, this 19th of April, 1974.

Robert Plotkin